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No. 91-66

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,

-against-

THE STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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Reply Memorandum on Petition for Writ of Certiorari To the Supreme Court of Alabama

Petitioner, Victor Stephens respectfully submits this memorandum in reply to the state's opposition to his request that a writ of certiorari be issued to review the decisions of the Supreme Court of Alabama affirming his convictions and death sentence and denying his motion for reconsideration of the same.

I. THE JURY OVERRIDE ISSUE

A. The Constitutional question has been preserved for review by this Court. As this Court recently held in *Ford v. Georgia*, __ U.S. ___, 111 S.Ct. 850 (1991): "In any given case... the sufficiency of... a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure." 111 S.Ct. at 857. Under this standard, and the applicable Alabama case law and statutes, and the prior decisions of this Court, the points raised in the petition for certiorari were all properly preserved in the state courts below.

The trial court's failure to apply standards in the course of imposing the death sentence and overriding of the jury's recommendation for life imprisonment, and the court's failure to state such standards so that its conduct could be properly assessed under appropriate constitutional guidelines, was plain error and a clear defect in the proceedings. As such, the court's decision is properly reviewable by this Court even if petitioner's counsel did not raise the point before the trial court. This issue was properly preserved due to application of Alabama appellate rules and case law, and, on an entirely independent ground, because it was specifically raised on petitioner's application for rehearing.

1. Upon application of Alabama Appellate Rules and case law. *Beck v. State of Alabama* 396 So.2d 645 (1981) is the case in which the Supreme Court of Alabama implemented the mandate of this Court set out in *Gregg v. Georgia*, 428 U.S. 153 (1976) for death penalty cases. Alabama added its own special variation in the *Gregg* procedure, however. (Some states in establishing their *Gregg* procedure have provided for a direct appeal to their highest court from their trial court when a death penalty is involved. As will be seen below, Alabama retains intermediate review, but statutory procedural rules and the *Beck* decision insure that the Alabama Supreme Court can review any plain error or defect in the proceeding, whether or not brought to the attention of the trial court.) In *Beck*, the Alabama Supreme Court noted that this procedure added "one more safeguard to insure that the death sentence is not being imposed arbitrarily or capriciously." 396 So.2d at 664. The court's holding in *Beck*, as it relates to the present issue, is as follows:

> In Alabama, a sentence of death is automatically reviewed by the Court of Criminal Appeals and, if affirmed, is then automatically reviewed on petition for certiorari by this Court. Rule 39(k), Alabama Rules of Appellate Procedure, provides:
>
> In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error

> or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner. *Id.*

The Alabama Supreme Court made it clear that this "plain error" scope of review was applicable to death penalty cases only. *Id.*

In the instant case, petitioner complains of plain error and a defect in the proceeding under review in that the trial court applied no standards -- neither the *Tedder* standard nor any other -- in imposing the death sentence and overriding the jury's recommendation of life imprisonment. Under Alabama law, the requirement that such a point be brought to the attention of the trial court is unnecessary. The federal constitutional question is preserved by statute, without special mention below, for review by the state's highest court. And accordingly, it is preserved for review by this Court.

2. Upon application for rehearing. The jury override issue was explicitly raised by petitioner in his application for rehearing to the Supreme Court of Alabama (Petitioner's Appendix D at 86, 90-92.[1] While the respondent state does not quarrel with this assertion, it contends that the constitutional point has not been preserved "because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion... [and that]... [s]uch a summary denial does not constitute a reviewable

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1. Under Alabama law, we believe that it was not necessary for Petitioner to raise this issue at all, as is more fully set out in Point A.1., above. However, as will be seen in the development of this point (A.2.), the authorities cited by respondent and applicable Alabama case law yield a second and independent ground for consideration of the jury override issue.

judgment," citing *Consolidated Turnpike Co. v. Norfolk & Co.*, 228 U.S. 326, 333-334 (1913). If the denial of the application for rehearing constituted a reviewable judgment, however, under *Herndon v. Georgia*, 295 U.S. 441, 443-444, as noted by respondent in its brief, the question would be properly preserved for review. Under Alabama law, contrary to respondent's contention, that is exactly what happened here.

It is important to review the exact holding in *Consolidated Turnpike Co. v. Norfolk & Oceanview Railway Company:*

> Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, *after the final judgment of the state court of last resort.* If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709, that the right shall be specially set up and denied, is complied with. 228 U.S. at 334. (Emphasis supplied.)

The procedural consequences of applications for rehearing are established in Rules 40 and 41 of the Alabama Rules of Appellate Procedure. Under Rule 41(a), "the timely filing of an application for rehearing will stay the certificate of judgment until disposition of the application unless otherwise ordered by the Court." The Committee Comments in discussing the precedential value while the case is pending for review note that:

> While this rule stays the issuance of the certificate of judgment, and *postpones the final judgment between the parties*, it did not prevent a decision of the Court of Criminal Appeals from having precedential value while the case was pending for review. (Emphasis supplied.)

Thus, the judgment of the Supreme Court of Alabama, unlike the decision of the Supreme Court of Appeals of the State of Virginia in the *Consolidated* case, was not a final judgment. In *Grantham v. State* 540 So.2d 775 (1987), the Court of Criminal Appeals of Alabama, per Taylor, J., makes it clear that "[a] judg-

ment of this Court is not final until the certificate of judgment is issued". *Id.* at 777. Because the jury override issue was properly brought to the attention of the Supreme Court prior to final judgment, it was ripe for review there, as it is here.

3. At all events petitioner did raise the jury override issue in the Alabama courts. While it is undoubtedly true that petitioner did not raise this issue in the state courts with the degree of clarity and eloquence with which he would have done in an optimal situation, a review of the record reveals that he raised it at trial, App. D to the petition for certiorari at 57-59; that it appears to have been considered by the Alabama Court of Criminal Appeals, *see* App. B to the petition for certiorari at 33 and 36 (court can find no error involving the propriety of the death sentence); in petitioning for a writ of certiorari before the Alabama Supreme Court, App. D to the petition for certiorari at 70, 85; and in moving for reconstruction, App. D to the petition for certiorari at D-90-92. It is respectfully submitted that petitioner raised the issue in the state courts with sufficient specificity to give this court jurisdiction and to warrant this court's entertaining his petition.[2]

B. The trial court's failure to apply the *Tedder* standard or other significant safeguard requires review by this Court under the *Spaziano* decision. It is true, as respondent contends, that this Court decided in *Spaziano v. Florida* 468 U.S. 447, 465 (1984), that:

> If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving

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2. In this regard it is important to note that this Court has intimated that the requirement of raising all pertinent issues in the lower courts may be relaxed in death penalty cases. *See generally Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985).

> the advice of the jury. The advice does not become a judgment simply because it comes from a jury.

In making this decision, however, this Court recognized "the significant safeguard" the *Tedder* standard affords a capital defendant in Florida (*Id.* at 465), and went on to say:

> We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See *Richardson v. State*, 437 So. 2d 1091 1095 (Fla. 1983); Miller v. State, 332 So. 2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference accorded by the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

We submit that it is not enough for respondent to rely on the first part of the *Spaziano* decision quoted above, while ignoring the second part. There is a split among the only three states (Alabama, Florida and Indiana) which permit a judicial override of a jury recommendation of life imprisonment. At this time, Alabama is the only state in which the judge may override without specifying or applying standards of review. It is undoubtedly for this reason that, unlike the other substantive points set forth in its brief, respondent does not deny the certworthiness of the jury override issue.

This case poses for the Court the important question of whether it is necessary for the Alabama court to have imposed a "significant safeguard" such as the *Tedder* standard, which is presently afforded a capital defendant in Florida (and also in Indiana). We submit that petitioner in this case was not protected by the safeguard afforded the defendant in the *Spaziano* decision, and, further, that as a result of this failure the decision of the trial judge in sentencing was arbitrary[3] and discriminatory. Far from

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3. The arbitrariness of the trial court's procedure was discussed throughout

disposing of this case, the *Spaziano* decision only emphasizes why this Court must, we submit, review this case.

II. THE REASONABLE DOUBT ISSUE AS FRAMED IN CAGE V. LOUISIANA.

A. The Constitutional question has been preserved for review by this Court. Petitioner raised this point before the Alabama courts. App. D at 95-97 and 110. Moreover, the arguments set out above (under Point I.A.) apply equally here. But there is another, and we maintain a compelling reason, why the instant point was preserved for appeal before this Court. This Court decided *Cage v. Louisiana*, 59 U.S.L.W 3361, on November 13, 1990, after petitioner had filed his petition for certiorari to the Alabama Supreme Court,[4] thus precluding petitioner from raising the issue before then. That is why petitioner is requesting (as an alternate ground to reversal) that the case be remanded to the Alabama Supreme Court for further consideration in light of this Court's decision in *Cage*. If it was necessary under Alabama law for petitioner to preserve this point at all (see point I.A. above), then the point was so preserved by petitioner in his application for rehearing, the first brief filed by petitioner after this Court had decided *Cage*. Under *Herndon v. Georgia*, 295 U.S. 441, 444 (1935) a federal claim is timely when raised in a petition for rehearing, if that petition presented the first opportunity for raising it, as it did here. Respondent's argument (answering brief p.14) that petitioner might have raised the point earlier is, we maintain, without merit, since petitioner did raise the point in a timely fashion, and in a manner appropriate for submission of a new point, a petition for rehearing.

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our petition and specifically at footnote 8, p. 9 of the petition.

4. Petitioner filed his petition for writ of certiorari to the Supreme Court of Alabama on October 5, 1990. Respondent's brief in opposition at 14.

B. The point is certworty. In its response, respondent also argues that petitioner's argument as to the *Cage* jury instruction issue is not worth of certiorari because it requests no modification or clarification of the *Cage* decision, but only its straightforward application. As the petition for certiorari makes clear, however, petitioner is not asking this Court to exercise full appellate review on the basis of *Cage*, but rather, to vacate and remand to the Supreme Court of Alabama for further consideration in light of *Cage*. Petition for certiorari at 11-13. It is respectfully submitted that, in this context, the issue is worthy of certiorari.[5]

III. THE LESSER INCLUDED OFFENSE ISSUE. Our petition for certiorari (at point III) argues that this case should be remanded to the Alabama Supreme Court for further consideration based on this Court's recent decision in *Schad v. Arizona*, 59 U.S.L.W. 4762 (June 21, 1991) because the trial court failed to charge the jury on felony murder, which is a non-capital offense in Alabama. While this point has also been preserved on the basis of the reasons set forth above (at Point I), there is an independent ground here, as well. The point was specifically mentioned, and therefore preserved, before the trial court and again before the Alabama Supreme Court (see petition for certiorari at 14 n. 14 and App. D thereto at 137-38 and 92-95). Although the point was not raised before the Alabama Court of Criminal Appeals, it is submitted that this was not necessary under Rule 13(k) of the Alabama Rules of Criminal Appeals and for reasons cited in point A above.[6]

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5. Petitioner alternatively asks this court to consider summarily reversing his conviction. Petition for certiorari at 13 n.12. However, it follows that the issue is worthy of certiorari in this context as well, since such a summary reversal is precisely what this Court did in *Cage*.

6. The Court of Criminal Appeals did in fact search the record (per Beck v. State) and found no plain error or defect which might have adversely affected appellant's substantial rights. (App B at 36)

As with the *Cage* issue, the State of Alabama argues that petitioner's argument as to the *Schad v. Arizona* issue is not worthy of certiorari because it requests no modification or clarification of the *Schad* decision, but only its straightforward application. Again, as the petition for certiorari makes clear, petitioner is not asking this Court to exercise full appellate review on the basis of *Schad* but rather to vacate and remand to the Supreme Court of Alabama for further consideration in light of *Schad*.

Alabama's contention that petitioner's argument as to this issue is precluded by *Hopper v. Evans*, 456 U.S. 605 (1982) is also without merit. *Hopper* involved a perpetrator who testified he had intended to kill. 456 U.S. at 612-13. In the present case, by contrast, as discussed at pages 15-16 of the petition for certiorari, there was evidence that petitioner did not have the intent to kill, but acted in response to a shotgun blast, which wounded him.[7]

IV. THE BATSON ISSUES. Finally, respondent's argument that the *Batson v. Kentucky* argument is not worthy of certiorari is similarly without merit. While it is true that this Court, in *Hernandez v. New York*, 59 U.S.L.W. 4501 (May 28, 1991) held that the acceptance or rejection of a prosecutor's professed race neutral reasons for exercising his peremptory challenges is within the trial court's discretion, this Court has not had the opportunity to elaborate on what circumstances might constitute an abuse of discretion. It is respectfully submitted that the present case presents an excellent opportunity for this Court of do so.

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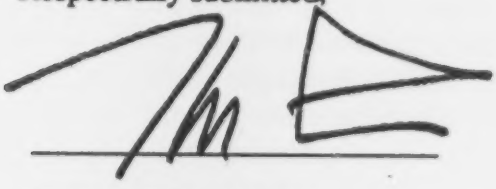
7. Because a shotgun pellet was found in the barrel of the .25 caliber pistol left at the scene, the trial judge concluded that the pistol was fired first. Based on the tone of the trial court's opinion, this finding infuriated the judge, causing his arbitrary conclusion that petitioner fired first and lied about it (App. C to the Petition at 6-7). Of course, the record indicates that the pistol was left at the scene of the crime -- perhaps thrown on a floor covered with shotgun pellets -- and the court's finding and its arbitrary imposition of the death penalty was unwarranted.

Conclusion

For the various reasons given, Victor Stephens' petition for certiorari should be granted.

Respectfully submitted,



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